Neutral Citation Number: [2022] EWHC 1290 (TCC)

Case No: HT-2020-000141

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/05/2022

Before:

VERONIQUE BUEHRLEN QC (SITTING AS A DEPUTY HIGH COURT JUDGE)

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Between :

COLDUNELL LIMITED	**Claimant**
- and -	
HOTEL MANAGEMENT INTERNATIONAL LIMITED	**Defendant**

- -
- -

Henry Webb (instructed by IBB Law) for the Claimant
Kester Lees (instructed by Pinsent Mason) for the Defendant

Hearing dates: 14 to 17 February 2022 and 29 April 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

"**This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Friday 27th May 2022 at 10:30am"**

VERONIQUE BUEHRLEN QC (Sitting as a Deputy High Court Judge):

Introduction

1. This is a claim for dilapidations brought by the Claimant as the former freeholder of The Mitre Hotel, Hampton Court Road, Hampton Court, Surrey ("the Property" or "the Hotel"). The Property is located opposite the main entrance to Hampton Court Palace, dates back to the 1660s and overlooks the river Thames. The Defendant is a well-known hotel operator.

2. The Lease is dated 20 April 1994 and was made between the Defendant and the Claimant for a term of 20 years commencing on 1 April 1994 and expiring on 31 March 2014. The tenancy enjoyed the protection of the security of tenure provisions of the Landlord and Tenant Act 1954 ("the Act"). Accompanying the Lease is a Schedule of Inventory Items found at the Property dated 9 November 1993. There is also an undated Deed of Variation relating to the construction of a Pavilion by the Defendant with a landlord's contribution and subsequent rent review.

3. The Defendant served a section 26 Notice under the Act on the Claimant dated 20 November 2013 requesting a new tenancy of the Property commencing on 25 May 2014. The Claimant served a counter notice under section 26(6) of the Act dated 16 January 2014 opposing the grant of a new tenancy on the grounds set out at sub-sections 30(1)(a), (c) and (g) of the Act. Contested lease renewal proceedings ensued that were eventually compromised by the Order of His Honour Judge Luba QC in the Central London County Court on 27 June 2016. That Order provided for the termination of the tenancy on 27 September 2016. The Defendant duly yielded up the Property on 27 September 2016 as required by the Order. Accordingly, whilst the contractual term of the Lease expired on 31 March 2014, the tenancy was statutorily continued pursuant to section 24 of the Act until 27 September 2016.

4. The Claimant then traded at the Property through a management company, Michel & Taylors Limited ("M&T"). The Claimant sold the Property in January 2020 for £6,955,000.

5. Several schedules of dilapidations were prepared and served in the context of the lease renewal proceedings and shortly prior to the surrender of the Lease, the Defendant commissioned an inventory of plight and condition report from an inventory company known as Verismart ("the Verismart Report"). Subsequently, Mr. Lane (the Claimant's building surveyor who had been involved in the various inspections of the Property and schedules of dilapidation in the context of the lease renewal proceedings) prepared a further schedule of dilapidations, referred to in the context of these proceedings as "the Terminal Schedule". This was served on the Defendant on 9 November 2017 together with a demand for £1,079,528.56 (ex. VAT). Some £464,820 (ex. VAT and professional fees) of the costs set out in the Terminal Schedule had already been

incurred by the Claimant following termination of the Lease. The first Schedule of Dilapidations dates to 21 March 2014.

6. The Defendant responded to the Terminal Schedule by way of a Scott Schedule including comments from both the Defendant's Managing Director, Mr. Van Der Heijden, and the Defendant's building surveyor, Mr. Marc Preston. A Reply Schedule, prepared by Mr. Lane, was served by the Claimant in December 2018. These proceedings were commenced on 15 April 2020. They have included the service of a further Scott Schedule prepared by Mr. Lane dated 23 April 2021 to which Mr. Preston provided a response on 19 May 2021.

The Covenants

7. Pursuant to the Lease, the Defendant covenanted with the Claimant (among other matters) as follows:

(i) By clause 2(5) of the Lease, from time to time and at all times during the said term well and substantially to repair and clean the Property and to keep the same in good and substantial repair and condition together with all additions thereto and all glass in the windows doors and other lights of the Property and sashcords and all Lessor's fixtures and fittings and appurtenances of whatsoever nature thereunto belonging (damage by fire and the other risks referred to in clause 3(2) excepted);

(ii) By clause 2(6) to replace such of the Lessor's fixtures and fittings furnishings and equipment specified in the Inventory as may during the tenancy become worn out lost or unfit for use by substituting therefor others of a like nature similar condition and equivalent quality to those existing at the commencement of the tenancy;

(iii) By clause 2(7):

(a) To paint with two coats at least of good quality paint in a proper and workmanlike manner every third year and in the last year of the said term (whether determined by effluxion of time or otherwise) all the gates fences doors and outside wood stucco and iron work and other outside parts of the Property heretofore usually painted and any additions thereto proper to be so painted and so often as aforesaid may be necessary but not less often than every fifth year of the term and in the last year of the term in a workmanlike manner to creosote distemper colour whitewash or otherwise treat all other outside parts of the Property as have usually theretofore been so treated all such work to be done to the reasonable satisfaction of the Lessor;

(b) To paint with two coats at least of good quality paint in a proper and workmanlike manner every fifth year of the term and in the last year of the said term (whether determined by effluxion of time or otherwise) all inside wood and iron work and other

inside parts of the Property heretofore usually painted and any additions thereto properly to be so painted and so often as aforesaid may be necessary but not less often than every fifth year of the term and in the last year of the said term in a workmanlike manner to wallpaper distemper colour whitewash or otherwise treat such other inside parts of the Property as have usually hereto before been so treated and on the occasion of each repainting to grain varnish restore and make good all ornamental work to the reasonable satisfaction of the Lessor;

(iv) By clause 2(9) at the expiration or sooner determination of the said term quietly to yield up the Property decorated repaired cleaned and kept (or in the case of furniture and equipment as aforesaid suitable replacements therefor as necessary) in accordance with the Lessee's covenants herein contained together with all additions and improvements thereto and all fixtures which during the term may be fixed or fastened to or upon the Property (damage by fire and other risks for which the Lessor shall be indemnified under its insurance policies and tenants or trade fixtures belonging to the Lessee only excepted) provided always that the Lessee makes good to the reasonable satisfaction of the Lessor all damage to the Property resulting from the removal thereof;

(v) By clause 2(12) not to use the demised premises otherwise than as a fully licensed High Class Public House and High Class Hotel with restaurant and banqueting and conference suites.

The scope of the Defendant's obligations under the Lease

8. The Court's first task is to determine the scope of the Defendant's obligations under this particular Lease. Having established those, I must then determine what condition the Premises were in at the time the Lease came to an end, whether that was such as to place the Defendant in breach of its obligations under the Lease and, if so, what remedial works were appropriate and the reasonable cost of those works. The measure of any damages will then be subject to the statutory cap as appropriate. I deal below with the condition of the Property and the measure of damages by reference to each of the claims made.

The Defendant's repair obligations

9. The Defendant's obligation under clause 2(5) of the Lease was "*well and substantially to repair and clean the Property and to keep the same in good and substantial repair and condition*" and under clause 2(9) to yield up the Premises "*decorated repaired cleaned and kept (or in the case of furniture and equipment as aforesaid suitable replacements therefor as necessary) in accordance with the Lessee's covenants herein contained* …"

10. Although the Defendant at times suggested otherwise, there was no material difference between the parties as to the law on the standard of repair required for compliance with the obligation imposed on a tenant by provisions such as clauses 2(5) and 2(9) of the Lease. Rather, the Defendant's case was that the Claimant and Mr. Lane had sought to apply the wrong standard, namely one that required the Hotel to be in a pristine and modernized condition, with every defect remedied.

11. It was common ground that the standard of repair imposed by a covenant to repair is such repair as, having regard to the age, character and locality of the premises would make them reasonably fit for the occupation of a reasonably minded tenant of the class who would be likely to take them: Dowding & Reynolds at 9-05; and Proudfoot v Hart (1890) 25 Q.B.D. 42 at [52] per Lord Esher MR (and at [55] per Lopes L.J.):

> "*Lopes, L. J., has drawn up a definition of the term " tenantable repair " with which I entirely agree. It is this: "'Good tenantable repair' is such repair as, having regard to the age, character, and locality of the house, would make it reasonably fit for the occupation of a reasonably-minded tenant of the class who would be likely to take it." The age of the house must be taken into account, because nobody could reasonably expect that a house 200 years old should be in the same condition of repair as a house lately built; the character of the house must be taken into account, because the same class of repairs as would be necessary to a palace would be wholly unnecessary to a cottage; and the locality of the house must be taken into account, because the state of repair necessary for a house in Grosvenor Square would be wholly different from the state of repair necessary for a house in Spitalfields. The house need not be put into the same condition as when the tenant took it; it need not be put into perfect repair; it need only be put into such a state of repair as renders it reasonably fit for the occupation of a reasonably-minded tenant of the class who would be likely to take it*."

12. One of the issues in Proudfoot concerned the condition of the kitchen floor. Lord Esher M.R. went on to say this in relation to it:

> "*As to the floor, it may have been rotten when the tenancy began. If it was in such a state when the tenancy began that no reasonable man would take the house with a floor in that state, then the tenant's obligation is to put the floor into tenantable repair. The question is, what is the state of the floor when the tenant is called upon to fulfil his covenant ? If it has become perfectly rotten he must put down a new floor, but if he can make it good in the sense in which I have spoken of all the other things—the paper, the paint, the whitewashing—he is not bound to put down a new floor. He may satisfy his obligation under the covenant by repairing it. If he leaves the floor out of repair when the tenancy*

ends, and the landlord comes in, the landlord may do the repairs himself and charge the costs as damages against the tenant; but he is only entitled to charge him with the necessary cost of a floor which would satisfy a reasonable man taking the premises. If the landlord puts down a new floor of a different kind, he cannot charge the tenant with the cost of it. He is entitled to charge the cost of doing what the tenant had to do under his covenant; but he is not entitled to charge according to what he has himself in fact done."

13. A similar covenant to clause 2(5) of the Lease, in that instance "*well and substantially to repair renew cleanse and keep in good and substantial repair and condition and maintain the demised premises*" was considered by HHJ Richard Seymour Q.C. in Simons v Dresden [2004] EWHC 993 (TCC) who said this:

"*The force of "substantially" and "substantial", in my judgment, was to require that in its essentials, but not necessarily in each and every minute detail, the premises were to be repaired, renewed, cleansed and kept. I do not think that that is a standard which in practical terms is different from the standard of "such repair as, having regard to age, character, and locality of the house, would make it reasonably fit for the occupation of a reasonably minded tenant of the class who would be likely to take it" which [counsel] submitted was the appropriate standard. What that standard requires in any given case must be a question of fact and degree*."

14. In this instance, the covenant was not only to keep the Property in good and substantial "*repair*" but also in good and substantial "*condition*". The obligation was therefore capable of extending to works that went beyond mere repair to include works required to keep the Property in good condition: Pullman Foods Ltd v Welsh Ministers [2020] EWCH 2521 (TCC) at [150]. However, the factors of age, character and locality are to be applied where the obligation is (as here) to "*keep*" the premises in "*good condition*": Lurcott v Wakeley [1911] 1 K.B. 905. That entails the Property being kept in a state appropriate to a building of that type in that location.

15. It was also agreed by the Parties that the following principles applied:

(i) That the covenant to repair did not require the Property to be kept in perfect repair or pristine condition: Riverside Property Investments v Blackhawk Automotive [2005] 1 E.G.L.R 114 at [54] per HHJ Coulson Q.C. (as he then was); it therefore follows that the Defendant was not required to attend to every defect, however minor.

(ii) The Defendant was not required to return the premises in the same condition as they were let: Mason v Total Final Elf [2003] 3 E.G.L.R 01 per Blackburn J. The obligation was to keep the Premises in good and substantial repair and condition and not in the same condition.

(iii) The date for assessment is the date on which the Lease came to an end, here 27 September 2016; although the standard of repair is to be judged by reference to the time the lease was granted, here 20 April 1994: Mason v TotalFina Elf UK Ltd [2003] 3 E.G.L.R. 91 and Anstruther-Gough-Cathorpe v McOscar [1924] 1 KB 716.

(iv) The covenant did not require the Defendant to deliver up the Property with new equipment or equipment that had any particular life expectancy but with equipment kept to a standard to be judged by reference to the condition of the equipment and fittings at the time of the demise: Sunlife Europe Properties v Tiger Aspect Holdings [2013] EWHC 43 (TCC).

(v) Age of the building is of particular importance in ascertaining the required standard of repair: Dowding & Reynolds at 9-11. *Firstly*, the standard of repair is that appropriate to the age of the building. To quote Atkin LJ in Anstruther-Gough-Calthorpe v Mc Oscar [1924] 1 K.B. 716 at 734:

> "*Time must be taken into account: an old article is not to be made new; but so far as repair can make good, or protect against the ravages of time and the elements, it must be undertaken*."

Secondly, the covenant does not require the Defendant to bring dated premises up to latter day standards of construction or specification: Dowding & Reynolds at 9-11 and Pgf II SA v Royal & Sun Alliance Insurance Plc. [2010] EWHC 1459 (TCC) at 51 per HHJ Toulmin Q.C. In the present context this means that the Defendant was not required to bring a 17th century building fully refurbished in 1994 to the standard of a 17th century building fully refurbished to 2019 standards.

(vi) Where equipment, fixtures and fittings do need to be replaced by the tenant so that the covenant is complied with, they need only be replaced to the same standard as was there at the time of the demise subject to any new equipment, fixtures or fittings meeting current legal, regulatory and safety standards.

16. Mr. Lees also submitted, on behalf of the Defendant, that the fact that the landlord had done certain works to achieve a reletting did not mean that those works correspond to what is required to comply with the standard of repair citing Dowding & Reynolds at 9-16. That is no doubt correct. The landlord might do more works to obtain a higher rental or less because pressure on housing might, for instance, mean that tenants would lease a property regardless of its condition.

17. I also accept Mr. Webb's submission based on paragraph 48 of the judgment of HHJ Seymour Q.C. in Simmons v Dresden [2004] EWHC 993 (TCC) that whether the covenant has been breached is a question of fact and degree, having regard to the age, character and locality of the premises at the grant of the Lease and the use to which the premises were permitted to be put.

The covenant under which the Property was let in clause 2(12) of the Lease was for the Property not to be used other than as a "High Class" hotel, restaurant and public house.

18. The unchallenged evidence of Ms O'Rourke was that the Property had been fully refurbished and reconfigured in 1992/1993 i.e. shortly before the demise. Contrary to the Defendant's submission it was not merely a question of "*some renovation*" being undertaken to the Property. The works included a 2-storey extension to the rear of the Property forming the restaurant and bar area extending over the river Thames. The fixtures and fittings as detailed in the Inventory attached to the Lease, were "*all new and of high quality*" and the entire property was decorated and fitted out to reflect Ms O'Rourke's brother's aspiration of returning the hotel "*to its former glory*" when it had been used as the venue for the wedding of the actress Julie Andrews to Tony Walton in the 1950s. Shortly after the demise the Hotel was classified as a 4 star hotel confirming that the Premises must have been in good condition.

19. Accordingly, I find that the relevant standard of repair was that of a 36-room "High Class" hotel, restaurant and public house, fully refurbished at the time of the demise to a high standard (together with high quality fixtures and fittings) properly maintained, situated in a historic Grade II listed building, built in 1665 (but with later additions), and located in Surrey on the banks of the river Thames opposite Hampton Court Palace.

20. The question I must ask is what, having regard to the age (1665 with several later additions), character (High Class Hotel, situated in a Grade II Historic Building), locality (Surrey on the banks of the river Thames opposite Hampton Court Palace) and condition of the Property at the time of the demise (fully refurbished), a reasonably minded hotel operator would require for the Premises to be put in such a state of repair as would make it reasonably fit for use as a High Class hotel, restaurant and public house were he to take the Premises.

The Redecoration Covenants

21. Sub-clauses 2(7)A and B of the Lease require repainting/decorating externally and internally in every third and fifth year respectively and in the last year of "*the said term*". It was common ground that the same standard should apply to those obligations as to the repairing covenant. However, the Defendant raised two further arguments:

    (i) *Firstly*, that the obligation to undertake decoration works was limited to the 12 months prior to expiry of the contractual term i.e. 31 March 2014 and not the 12 months expiring with determination of the Lease on 28 September 2016; and

    (ii) *Secondly*, that the cost of undertaking the works was only recoverable if it was proportionate to undertake those works in accordance with the principle in Ruxley Electronics Ltd v Forsyth [1996] 1 AC 344.

22. The second of these issues goes to the measure of damages and I therefore deal with it in that context below.

23. As to the Defendant's first submission, the obligations imposed by sub-clauses 2(7)A and B of the Lease require redecoration "*every third/fifth year and in the last year of the said term*". The Defendant submitted that on proper construction of these provisions, the "*said term*" means the contractual term of 20 years that expired on 31 March 2014. Accordingly, the obligation was to redecorate in the 12 months prior to 31 March 2014 and not in the 12 months preceding actual expiry of the Lease on 27 September 2016. The Defendant submitted that clause 1 of the Lease defines the term as 20 years, that there is no reference to statutory continuation of the Lease and that the wording in sub-clauses 2(7)A and B "*whether determined by effluxion of time or otherwise howsoever*" refers back to the 20 year contractual term and does not therefore operate to extend it.

24. In response, the Claimant pointed out that the Defendant's assertion does not form part of its pleaded case (although no further point was taken in relation to that) and that in any event it is not correct. In particular, the Claimant submitted that:

    (i) It is settled law that upon the continuation of a 1954 Act tenancy, terms such as to repair or decorate (as well as to pay rent) which bound the parties during the original tenancy will be carried over into the continuation tenancy: City of London Corp v Fell [1994] AC 458 at 462H to 463E and Dowding & Reynolds at 2-08; and

    (ii) The phrase "*the said term*" must mean the same thing throughout the Lease. Accordingly, if the Defendant's submission was correct, it would mean that many of the fundamental obligations imposed on both parties to the Lease would have ceased to operate on expiry of the contractual term. That includes the obligation to repair (clauses 2(4) and (5)), the obligation to deliver up (clause 2(9)), the obligation to remove additions (clause 2(10.4)), the obligation to comply with the requirements of appropriate authorities (clause 2(24)) and the landlord's obligation to insure the Property in clause 3(2). These would all have ended on expiry of the contractual term, which the Claimant says cannot be right.

25. There are it seems to me two issues. The first concerns the effect of the Act. The second the proper construction of the Lease.

26. As regards the first issue, there is nothing to suggest that section 24 of the Act operates to continue a tenancy other than on the same terms as those originally agreed pending agreement or determination by the Court of the terms of any new tenancy. I would expect all terms as to repair and redecoration that bound the parties during the original term of the Lease to be carried over into the statutorily extended term i.e. the continuation of the tenancy. That that is the right

conclusion finds some support in two cases concerned with statutory extensions under the Rent Acts referred to in Dowling & Reynolds. In Ward v Hicks [1952] C.L.Y 3023 (although no full copy of the decision was available) a covenant to redecorate "*on the expiration or determination of the said term*" is said to have been held to be carried over into the statutory tenancy. A similar conclusion was reached in connection with what had become a statutory tenancy by the Court of Appeal in Boyer v Warbey (no. 1) [1953] 1 Q.B. 234 (see in particular Denning LJ's judgment at 246). In that instance, there was an obligation on the tenant to pay a fixed sum in lieu of undertaking repairs on her "*quitting the said premises at the end of the term hereby granted*" and "*immediately after the expiration or determination of the tenancy whenever it shall happen*". The Court of Appeal held that the agreement was incorporated into the statutory tenancy.

27. In City of London Corp v Fell [1994] 1 AC 458 where section 24 of the Act was invoked, the House of Lords noted how by virtue of the Act the term of the lease i.e. the tenancy did not come to an end under the lease but was continued under the Act. The words "*term*" and "*tenancy*" were in effect used inter-changeably. The proprietary interest together with the covenants that attach to it therefore continued. Put another way, the term granted continues by way of statutory extension on the same terms as the exiting lease until a new tenancy is created or not as the case may be.

28. Mr. Lees submitted that the obligation to redecorate in the 12 months preceding the expiry of the contractual term was a one-off obligation required to be undertaken 12 months prior to 31 March 2016 regardless of any statutory extension and that accordingly the obligation was not a continuous obligation such as would then form part of the statutory tenancy. I have come to the conclusion that that submission is not correct because in my judgment on proper interpretation the obligation is to decorate in the 12 months leading up to determination of the tenancy i.e. of the term howsoever terminated.

29. Dealing with the proper interpretation of the scope of the obligations envisaged by clauses 2(7)A and B of the Lease, I am mindful of the applicable rules of contract interpretation and need do no more for that purpose than cite paragraph 15 of Lord Neuberger's judgment in *Arnold v Britton* [2015] AC 1619:

> *15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean" ... And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of*

> *the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions.*

30. It seems to me that a reasonable person would have understood that the obligation to redecorate "*in the last year of the said term*" meant in the last year of the tenancy. All the more so if as one might expect of a hotel operator entering into this type of tenancy he knew that it would be open to him to seek a statutory extension of the Lease pursuant to section 24 of the Act. It seems to me obvious that the Parties intended that their respective obligations should apply throughout the duration of the demise. The purpose of the provision was no doubt to ensure that the Property would be returned to the landlord in a recently decorated condition at the end of the demise. Further, I consider that the words "*whether determined by effluxion of time or otherwise howsoever*" coming after "*in the last year of the said term*" in both clauses 2(7)A and B do imply that the Parties intended the obligation to apply regardless of how the term of the Lease came to an end. That would include circumstances in which the contractual term was extended because the tenant chose to avail itself of the benefit of Part II of the Act.

31. Mr. Lees submitted that it made commercial sense for the redecorating obligation to be limited to the final year of the contractual term because a tenant would only know the eventual termination date of a statutorily continued tenancy 3 months in advance following the making of an order refusing a new tenancy by virtue of section 65 of the Act. I am not persuaded by that argument. It seems to me that the tenant takes the risk when seeking to rely on section 24 of the Act that he may not succeed and that he will need to comply with all the covenants including those applicable on yielding up of the Property which in this case included "*decorated repaired cleaned and kept … in accordance with the Lessee's covenants*". He might, for instance, therefore plan to undertake the works required should he fail to obtain the new tenancy sought.

32. Further, I agree with Mr. Webb that on proper interpretation the phrase "*the said term*" was intended to mean the same thing throughout the Lease. That is certainly the case prior to any statutory extension. The words "*the said term*" could not then mean something different in relation to the different obligations imposed on the Parties once the Lease had been statutorily extended. That would be a recipe for significant confusion and uncertainty as to the Parties' respective obligations in the event of a statutory extension. It cannot have been what the Parties objectively intended when entering into the Lease.

33. Accordingly, I find that the obligation to redecorate under clauses 2(7)A and B was to do so in the 12 months preceding expiry of the Lease on 27 September 2016.

The measure of damages

34. As a general rule, the measure of damages for breach of a repairing covenant is the reasonable cost of the works required to put the property in the condition it ought to have been in when delivered up, whether those works were undertaken by the landlord or not, subject of course to the statutory cap under section 18 of the Landlord and Tenant Act 1927 ("the 1927 Act") which limits the damages to the diminution in value of the landlord's reversion caused by the breaches : Sunlife Europe Properties Ltd v Tiger Aspect Holdings [2013] EWCA Civ 1656 at [1].

35. Mr. Lees' second submission (see para. 21(ii) above), however, was that the cost of undertaking any of the works is only recoverable if it was proportionate to undertake those works in accordance with the principle in Ruxley Electronics Ltd v Forsyth [1996] 1 AC 344. In Ruxley, the House of Lords held that the general rule that the cost of reinstatement is the appropriate measure of damages does not apply if the expenditure would be out of all proportion to the benefit to be obtained. In that case, the appropriate measure of damages is the diminution in value of the asset rather than the cost of repair. No reference was made in Sunlife by Lewison LJ to the Ruxley principle when describing the common law measure of damages in dilapidation cases. However, I agree with Mr. Lees that the point is open for consideration since Arden LJ considered that the general measure of damages in a dilapidations case was subject to general principles of law, including the principle established in Ruxley, in her judgment in Latimer v Carney [2006] EWCA Civ 1417.

36. There is a debate as to whether the common law measure of damages in relation to covenants to repair is subject to the rule in Ruxley which is discussed in Dowling & Reynolds at 29-08. For my part I can see the force of not distinguishing the measure of damages in dilapidation cases from the measure for breach of contract in other cases. However, if I had to decide the matter then I think that in light of the fact that dilapidation claims have not generally been decided by reference to the Ruxley principle to date, the added uncertainty that the application of the principle would bring to dilapidation cases, the operation of the statutory cap and the judgment of Lewison LJ in Sunlife I would not have opted to apply the principle. In particular, I am mindful of what Lewison LJ said at paragraphs 5 to 7 of his judgment in Sunlife, namely:

> "*5. … the common law measure of damages was established by the decision of this court in Joyner v Weeks [1891] 2 QB 31. Lord Esher MR formulated it thus:*
>
> > *"That rule is that, when there is a lease with a covenant to leave the premises in repair at the end of the term, and such covenant is broken, the lessee must pay what the lessor proves to be a reasonable and proper amount for putting the premises into the state of repair in which they ought to have been left".*
>
> *6. Fry LJ agreed, approving the earlier judgment of Denman J in Morgan v Hardy (1886) 17 QBD 770, who in turn approved the statement in Mayne on Damages:*

> *"Where the action is brought upon the covenant to repair at the end of the term, the damages are such a sum as will put the premises into the state of repair in which the tenant was bound to leave them."*
>
> *7. Thus, in assessing the common law measure of damages the judge was required to find the sum that would have put the premises into the condition in which the tenant ought to have left them …*"

37. However, in my view, Mr. Webb is correct when he says that none of this matters in the present case. That is because, *firstly*, I do not consider that any of the costs (be they incurred or not incurred) can be said to be out of all proportion to the benefit to be obtained by undertaking the works. Indeed, the valuation experts agreed that the majority, if not all, the works for which costs had been incurred diminished the value of the reversion by at least as much as the reasonable cost of those works. *Secondly*, insofar as the claim is for costs not incurred it is already limited to the diminution in value of the Property as a result of the breach of covenant.

38. As regards other covenants, such as the covenant to decorate in clause 2(7) of the Lease, the normal common law measure of damages applies. If the relevant works have been carried out then the Claimant will be entitled to the reasonable cost of undertaking those works and it is common ground that the Ruxley principle applies. If the relevant works have not been carried out then the Claimant will be entitled to the diminution in value of the reversion arising out of the breach.

The evidence

The factual evidence

39. I heard evidence from Mr. Hugo Lowry on behalf of the Claimant and from Mr. Hans Van Der Heijden and Mr. Ramsay on behalf of the Defendant.

40. Mr. Lowry was an Asset Manager within the Coldunell group of companies of which the Claimant is a member. He first became involved with the Property in 2013. Mr. Lowry gave evidence as to the condition of the Property prior to termination of the Lease. He was directly involved at the time of the handover of the Property and in the subsequent works undertaken by the Claimant to the Property. Mr. Lowry gave his evidence in a straightforward manner and I formed the view that, when giving evidence, Mr. Lowry sought to avoid being controversial or inflammatory.

41. The Claimant also relied on a witness statement from Ms Rita O'Rourke. Ms O'Rourke is a director of the Claimant. As noted above, she gave evidence in her statement of the fact that the Property had been completely refurbished in 1992/1993 to a high standard. Ms O'Rourke's witness statement was admitted in evidence and she was not cross examined.

42. Mr. Van Der Heijden is now the Managing Director of the Defendant. At the time of the events the subject matter of these proceedings, Mr. Van Der Heijden was the Defendant's director of operations based in the Netherlands. Mr. Van Der Heijden was not able to help with very much in relation to the condition of the Property as he had not inspected it. So, for instance, whilst Mr. Van Der Heijden was at the Property at the date of the handover he could not confirm or deny what condition the kitchens were in as he had not seen them. Generally speaking, Mr. Van Der Heijden's witness statement tended to state that if an issue had arisen it would have been dealt with. However, he had no personal knowledge of whether that was in fact the case. The witness statement also consisted largely of argument rather than evidence. As a result, the statement was of very limited assistance. It also transpired that to the extent that Mr. Van Der Heijden's witness statement did contain evidence, such as in relation to the boilers, that evidence proved to be incorrect by reference to the contemporaneous documentation.

43. Mr. Ramsey is the Finance Director for the Defendant. He did not deal with any day-to-day management issues. Once more, I formed the impression that Mr. Ramsey had little direct knowledge of the condition of the Hotel at the time of the handover. He merely asserted that the Defendant maintained the Property to a high standard and did not recall any issues relating to the standard of cleanliness of the Hotel at the end of the Lease. As in the case of Mr. Van Der Heijden, much of Mr. Ramsey's evidence was to the effect that, had there been an issue, it would have been dealt with or he would have been made aware of any issues and that he was not. However, the various reports, photographs and videos clearly evidence the fact that there were issues. If they were not drawn to Mr. Ramsey's attention then they should have been. The position was particularly stark in relation to the boilers. Mr. Ramsey's witness statement states in relation to the boilers that "*had there been issues, the Hotels' General Manager or maintenance staff would have made me aware*". However, that there were serious issues with the boilers is clear from the evidence. This lack of direct knowledge on the part of Mr. Ramsey (for which I am not criticizing him) makes it very difficult to rely on any of his evidence as to the condition of the Property.

The Expert evidence

44. I also heard evidence on the condition of the Property and works that were required and undertaken by the Claimant from Mr. Lane, who was instructed on behalf of the Claimant, and from Mr. Preston on behalf of the Defendant.

45. Mr. Lane is a Chartered Building Surveyor with 23 years' experience specializing in dilapidations. He was very familiar with the Property having first been instructed by the Claimant in 2014, if not before, to deal with an insurance claim arising out of flooding at the Property. Mr. Lane had conducted numerous inspections of the Property over several years, including at the

end of the Lease when he spent 3 to 4 days at the Property taking photographs and then assisting with videos depicting various issues with the Property taken by Appleby Petfield in early October 2016. He was also the contract administrator for the external works and boiler repairs and therefore had personal knowledge of what work was required and why.

46. The Defendant argued that Mr. Lane could not be independent because he had performed a dual role both dealing with the dilapidations claim and as contracts administrator for the repair and remedial works. I do not consider that this duality of roles prevented Mr. Lane from giving his genuinely held independent expert opinion to the Court. Given the sums at stake in these proceedings, I consider that it was reasonable and proportionate for the Claimant to rely on Mr. Lane's expert evidence in relation to the dilapidations and to instruct him to deal with the remedial works given his detailed knowledge of the condition of the Property and works required.

47. Mr. Lees submitted that Mr. Lane was obstructive, argumentative and defensive in his answers to cross-examination and accused Mr. Lane of giving misleading answers and being untruthful. Save in one instance where Mr. Lane's answers seemed confused, I reject those criticisms of Mr. Lane. They are in my view unfounded. Notably, Mr. Lees accused Mr. Lane of having invented a meeting with Mr. Seabrook, the Defendant's architect, (when giving evidence) at which Mr. Seabrook had admitted that certain works undertaken by the Defendant were insufficient. Mr Lees relied on the fact that Mr. Lane had not mentioned this meeting previously despite referring to other meetings in his expert report. That, in my view, was no basis on which to accuse Mr. Lane of lying on oath. There was nothing to suggest that Mr. Lane was asked to set out each and every meeting he had with Mr. Seabrook over several years for the purposes of preparing his expert report and he had no way of knowing what might ultimately be relevant during the course of the hearing.

48. Similarly, Mr. Lees criticized Mr. Lane in relation to his evidence as to his discussions with Mr. Hardwick as to which areas of the Property a hypothetical purchaser would substantially refurbish and the impact of those discussions on Mr. Lane's estimated repair costs. There I think that Mr. Lees was on firmer ground. The apparent analysis set out in the relevant schedule where some items of work were included but not others did not always make sense. Mr. Lane said he had formed a view as to what the bottom line should be and then reworked the figures going to make up the total figure but I agree with Mr. Lees that that that was not entirely satisfactory. However, I do not think that is anywhere near a sufficient basis on which to disregard Mr. Lane's evidence as a whole as Mr. Lees sought to persuade me to do.

49. I formed the view, having carefully listened and observed Mr. Lane, that he gave his evidence in a forthright and measured manner. He answered the questions put to him clearly accepting the limits of his knowledge in relation to certain matters. He made concessions in relation to certain

items such as betterment to the boiler installation and the extent of the alleged furniture damage. I think that overall Mr. Lane was seeking to assist the Court and that he well understood that he had an independent role to perform. I have no difficulty in accepting his evidence as to the condition of the Property at the time the Lease expired.

50. The Defendant instructed Mr. Marc Preston, a chartered Quantity Surveyor with 42 years industry experience. Mr. Preston regularly acts for parties in adjudications and from time to time as an expert witness, although I understand that this was the first occasion on which Mr. Preston was called upon to give expert evidence in Court. Unfortunately, it was plain, throughout the course of the oral evidence given by Mr. Preston and from various paragraphs of his report (such as paragraphs 5.50, 5.55 and 5.56) that he was arguing the Defendant's case. A case to which Mr. Preston repeatedly referred as "*our case*". This was illustrated time and time again by Mr. Preston not answering counsel's questions, challenging the veracity of the underlying factual evidence presented by the Claimant, relying on argument rather than expert opinion and totally disregarding the merits of the argument being advanced by him. Mr. Preston's expert report suffered from many of the shortcomings that were evident during his oral evidence.

51. The situation was made worse by the obvious lack of credibility in relation to several of the opinions Mr. Preston expressed. For instance, Mr. Preston insisted that the boilers were "*in good and substantial repair and condition*" at the date of termination of the Lease despite the substantial body of evidence to the contrary. He maintained that a tower instead of scaffolding could have been used to carry out the works to the rotunda even though the rotunda hangs out over the river making the use of a tower an obvious nonsense. He would not accept that hardwood window frames would not have deteriorated to the condition seen in certain of the Audit-Pro Report photographs in a period of 6 months. Similarly, many of Mr. Preston's costings lacked all credibility, as was illustrated by his allocating £15 for outside redecoration works to the windows of certain bedrooms and by his evidence that a Contract Administrator's fee of £7,750 was appropriate for both £20,000 of works and £350,000 of works i.e. regardless of the scope of work.

52. Further, unlike Mr. Lane, Mr. Preston had not carried out any inspection of the Property in relation to key items including the condition of the windows, the boilers, the carpets and the furniture. Instead, his opinion was based on his view of the photographs included in the Verismart Report and to a limited extent on the AuditPro Report. He ignored the photographs taken by Mr. Lane and the video evidence despite these providing contemporaneous evidence of the condition of the Property in September 2016. Further, even in relation to the Verismart photographs Mr. Preston had not taken into account photographs showing disrepair because "*I probably had a look at the photograph and made a snap judgement*" or "*I may have missed it*

because it is not designated as a window picture". The impression given to the Court was that he had taken a very slap dash approach even to the limited evidence of condition that he considered relevant. He also treated the Verismart report, that was principally an inventory schedule with little evidence in relation to the exterior condition of the Property, as though it was a comprehensive record which clearly it was not. Mr. Preston also ignored potential evidence of disrepair in the Audi-Pro report because he considered that photographs taken in April 2017 did not prove to his satisfaction that the disrepair existed as at 27 September 2016 regardless of the nature of the disrepair concerned.

53. It was also unfortunate that Mr. Preston misstated to the Court the evidence provided by the Forensic Flooring expert, Mr. Inwood. Mr. Inwood's report concluded that a new Ege carpet must have been "*an improvement and preferable choice, over a much older Axminster*" not that the Ege carpet was the equivalent of the original Axminster, as Mr. Preston stated when giving evidence. Mr. Preston's allegations to the effect that the Claimant had undertaken unnecessary works in anticipation that they could recharge these to the Claimant, and that they "*wished to lay the costs at the door of the Defendant*" were unfounded and inappropriate allegations for an independent expert to make.

54. In short, I fully accept the Claimant's submission that the exercise Mr. Preston undertook was that of advocate for "*his client*" and not that of an independent expert. It follows from the above that I have not been able to place any reliance on Mr. Preston's evidence.

55. In relation to valuation, the Claimant relied on the evidence of Mr. Paul Hardwick. Mr. Hardwick is a Chartered Surveyor and a RICS Registered Valuer. He is a director of Fleurets, a long established firm of Chartered Surveyors that deal exclusively in the sale and valuation of hotels, restaurants, public houses and other forms of licensed and leisure property. Mr. Hardwick has been involved in the relevant property sector for over 20 years. Once more the Defendant sought to cast aspersions over the evidence of Mr. Hardwick on the basis that his firm had dealt with the Claimant for many years and that he and one of his colleagues had handled the marketing and sale of the Hotel. However, as Mr. Hardwick explained there was no ongoing relationship between his firm and the Claimant and he did not feel compromised. Further, he was providing evidence of value in September 2016 whereas his involvement in the marketing of the Hotel did not start until May 2019. I did not consider that Mr. Hardwick's involvement in the marketing and sale of the Property in May 2019 prevented him from giving his honest professional opinion as to the value of the Hotel in September 2016. That opinion was not always favourable to the Claimant. For instance, Mr. Hardwick made clear that not all breaches of the covenants would impact the price a hypothetical purchaser would be willing to pay. His view was also that a

hypothetical purchaser would replace all the bathrooms. Accordingly, the Claimant was unable to pursue any claim in relation to the condition of the ensuite and other bathroom facilities.

56. The Defendant relied on the evidence of Mr. Chess. Mr. Chess is also a Chartered Surveyor with some 25 years' experience in the hotel sector. He works part time for Gerald Eve, a firm of property consultants with the position of Partner in the Hotel section of the Leisure team and has his own consultancy business.

57. There was a considerable amount of agreement as between the valuation experts which was very helpful and both experts gave their evidence in a measured and thoughtful manner seeking to assist the Court.

The likelihood that the Defendant did not comply with its repair and decorating obligations under the Lease

58. I accept Mr. Webb's submission that there are several general factors that strongly suggest that the Defendant did not comply with its repair and decorating obligations in the months and indeed years leading up to termination of the Lease making it more likely that the Defendant was in breach of its obligations as at 27 September 2016. Notably:

(i) It transpired during Mr. Van der Heijden's cross examination that, contrary to his witness statement, one of the boilers had not been replaced in 2011. Indeed, whilst a request for capital expenditure in the sum of £17,000 had been submitted by the Hotel's then manager to head office in early 2012, Mr. Van der Heijden had written in manuscript on the document "*Wait until new rental or purchase deal*". Mr. Van der Heijden agreed that a decision must have been made not to spend the money on the boilers until a new lease had been agreed. This was a telling note in circumstances in which the boilers, or key parts of them, were being described by engineers then servicing them as "*obsolete*". It also revealed a certain attitude on the part of the Defendant, namely that any capital expenditure should be avoided until a new rental or purchase of the Property was agreed. That was some 5 years before the Lease ended.

(ii) There was very little evidence from the Defendant of its having spent sums repairing and maintaining the Property in the years leading up to termination of the Lease. Mr. Ramsey gave evidence that the Defendant had carried out some repainting and decorating works to the Hotel but there was no evidence of any specification, tender process or invoices for those works. There was an extract from the Defendant's accounting system but Mr. Ramsey could not help with whether the figures related to internal or external works or even whether all the codes on the system related to the Hotel. The sums involved were also relatively minor given the period of time concerned and what would be involved in

maintaining a property such as this. At the same time, Mr. Chess' evidence was that there was no provision in the Defendant's accounts for the years 2014/2015, 2015/2016 and to September 2016 for FF&E renewals i.e. for the cost of replacing furniture, fixtures and equipment. The obvious inference being that monies were not spent by the Claimant on such matters.

(iii) The condition of the kitchen on 27 September 2016 is telling of very poor standards of cleanliness and maintenance at the Hotel. The Verismart report describes the ceiling, walls and floor of the kitchen as "*dirty*", "*overall dirty*" and "*dirty throughout*", all switches as in need of cleaning and the equipment in need of attention. Pictures of the kitchen and storage areas taken by Mr. Lane showed the areas photographed to be filthy. A European Safety Bureau Audit report dated 27-29 September 2016 identified "*significant non compliance*" in the "*food storage and food preparation areas, with reference to both EC Regulation (EC) 852/2004 and Food Hygiene (England) Regulations 2006*" relating to "*evidence of poor cleaning management over a significant time period and out of date high risk raw foods stored in the main chest freezer*". The report recommended a "*deep clean of all food storage and food preparation areas*". It went on to state that "*Pest Contractor reports have historically highlighted the need for improved cleaning within the premises and document a rodent problem within the external waste area that has not been addressed*".

(iv) The documentary evidence as to the condition of the kitchen was in line with the evidence of Mr. Lowry. He described the kitchen as "*utterly filthy*". He explained that he had been advised by others, including the head chef of the Claimant's Oxford Abingdon Hotel, that the kitchen was not safe and that he had "*never seen a kitchen in such an unhygienic and filthy condition*". Mr. Lowry explained that all surfaces in the kitchen were dirty, that there was no evidence of any adequate cleaning regime or protocols, that the oil in the fryers was black and that there was a buildup of thick grease and material behind the equipment. In the event, the Claimant closed the kitchen for a period of 5 days to clean it. I do not think that Mr. Lowry was exaggerating in his description of the condition of the kitchen.

(v) The photographs taken by Mr. Lane and the video evidence as to the condition of the Property evidence a property that had not seen much maintenance for a considerable period of time. There were numerous photographs of poor internal and external decoration, rotten timber frames, broken door handles, damaged and dirty carpets, stained ceilings, broken and/or tarnished window and other fittings, broken and missing roof tiles, broken sash cords, cracked and patch repaired steps, cracks in render, ill-fitting electrical and other fixtures and similar issues.

(vi) It is common ground that the circumstances culminating in the termination of the Lease were not amicable. The contractual term of the Lease expired in March 2014. There followed some two years of legal proceedings before a consent order was agreed on 27 June 2016 to the effect that there would be no new lease. In the absence of any evidence to the contrary it would not be surprising if the Defendant did not wish to invest in the Property not knowing whether it would be able to remain there.

The condition of the Property as at termination of the Lease and the cost of repairs

59. In addition to the evidence of Mr. Lowry and Mr. Lane who were present and inspected the Property on and in the days following expiry of the Lease, the following documentary evidence was available in relation to the condition of the Property:

(i) The VeriSmart Report. This was a report, entitled "*Inventory and Schedule of Plight and Condition*" for the Property, prepared on 22 September 2016 by a Mr. Jonathan Senior. The main part of the report is comprised of 321 pages followed by a 415 page report in relation to the bedrooms. However, only some 22 pages related to the outside of the Property and surrounding buildings and there was very little, if anything, in relation to the exterior of the windows.

(ii) The Audit-Pro Report. This was a schedule of photographs taken by the contractor in the period April to July 2017 evidencing the then condition of the windows and French doors and the repair works that were undertaken by the contactor at that time. The Defendant sought to dismiss the evidential value of this material on the basis that it only showed the condition of the Property over 6 months and one winter after lease expiry. In my judgment, the schedule needs to be viewed with that fact in mind but nevertheless it provides evidence from which one can extrapolate the likely condition of certain elements of the Property in late September 2016. For instance, in my judgment it is most unlikely that properly maintained hard wood window frames would deteriorate to the condition seen in some of the photographs in a period of 6 – 9 months.

(iii) Photographs taken by Mr. Lane evidencing poor repairs and other issues with the Property.

(iv) Videos prepared by Appleby Petfield with the assistance of Mr. Lane taken on 5 and 6th October 2016 showing various defects and problems with the condition of the Property.

(v) A small number of other reports including an initial dilapidations report prepared by M&T at and shortly after the takeover, an Inventory of the Trade Furniture, Fittings and Effects at the Hotel prepared by Venners dated 28 September 2016 and an Engineering Services Solutions FHPESS Survey of the Boiler and Kitchen Gas Services dated 13 January 2017

("the FHPESS Report"). To those reports fall to be added a number of Gas Safety Record Certificates in respect of the boilers.

60. Mr. Lees submitted that Mr. Lane's photographs and the Appleby Petfield videos should be treated by the Court with considerable caution arguing that they were selective and focused on defects which were minor. I do not agree. The photographs and videos are contemporaneous or near contemporaneous evidence of the issues in relation to the Property complained of by the Claimant and the defects they evidence do not in my judgment fall to be categorized as "*minor*", all the more so when viewed as a whole.

61. The Parties helpfully grouped the key aspects in respect of which it was alleged that the Property failed to meet the requirements of the Lease covenants. The items fell into two groups: (i) Items in relation to which the Claimant had undertaken repair and remedial works and incurred costs totaling £429,762.15 (referred to as "Incurred costs"); and (ii) Items which the Claimant had not remedied prior to selling the Hotel in 2020 (referred to as "Costs not incurred") totaling £270,866. The items were grouped as follows, with the Item numbers in brackets referring to the Item in the Scott Schedule:

Incurred Costs

1. Boilers (Items 3.7 to 3.12)
2. External Decoration (Items 5.0 – 5.2)
3. Window Repairs (Item 2.16)
4. External repair works (including stone steps) (Items 2.0, 2.1, 2.6, 2.7, 2.8, 2.11, 2.17 and 2.18)
5. Scaffolding (Item 6.2)
6. Contractor Preliminaries
7. Cleaning (Items 1.23, 2.9 and 3.5)
8. Kitchen fan (Item 3)
9. Electrical circuits (Items 3.2 and 3.3)

Costs not incurred

1. Carpets (Items 1, 1.2 and 1.3)
2. Replacement furniture (Item 1.15)
3. Internal decorations (Items 5.3 to 5.5)

4. Contractor Preliminaries

62. During the Trial, the Parties reached agreement on a no-admissions basis in relation to a number of the specified "Incurred costs" items. These being Items 1.23, 2, 2.1, 2.2, 2.4, 2.6, 2.7, 2.8, 2.9, 2.10, 2.11, 2.13, 2.15, 2.17, 2.18, 3, 3.1, 3.2, 3.3 and 3.5 with an agreed total of incurred cost of £29,406.05. The most significant of these Items in terms of the claim were Item 1.23 (cleaning), Item 2.0 (defective clay roof tiles), item 2.17 (repair and repointing works to fair faced bricks in stack) and Item 3.0 (Kitchen gas interlock and fan replacement). However, the agreement related to the cost of the repairs undertaken and so the items remained relevant to the overall issue as to whether there was a breach of the covenant at clause 2(5) of the Lease.

63. I have no hesitation in finding that the Items in relation to which the Parties were able to agree the cost of repairs were Items whose condition placed the Defendant in breach of its repairing covenant under clauses 2(5) or 2(6) of the Lease. These were all items that were left at the time of the handover in a condition that required repair, cleaning or replacing. They are all items that a reasonably minded high class hotel operator would reasonably require to be addressed before taking a lease of the Property. Thus, merely by way of example broken roof tiles are an obvious instance of a lack of repair and the deep clean of the hotel (item 1.23) was very much required as is evidenced by the condition of the kitchen that I have addressed above. The kitchen gas interlock and fan replacement accounts for £9,886.08 of the agreed sum. The existing ventilation system was "*in poor condition*" and did not comply with the necessary regulatory requirements posing a health and safety risk, as was explained in detail in the FHPESS report which recommended replacement with immediate effect.

64. I deal with each of the remaining individual items in dispute together with the quantum of the costs claimed in respect of that item in turn.

Incurred Costs

The boilers (Items 3.7 to 3.12) (£158,852)

65. It is common ground that the Property was let with 4 boilers. The 4 boilers were therefore part of the "Demised Premises" and it follows that by clauses 2(5) and (9) of the Lease the Defendant covenanted to keep each boiler in good and substantial repair and condition and to deliver them up to the Claimant in that state.

66. The Claimant's case is that none of the 4 boilers was in good and substantial repair and condition at expiry of the Lease. The Defendant's case is that at the time of lease expiry there were 2 boilers and 2 hot water heaters in a condition sufficient to meet the standard of repair required by clause 2(5).

67. It is common ground that at the time the Lease expired 2 of the boilers were defunct (although they had never been removed) and that there were two water heaters in good working order and two boilers providing heating and hot water. The Defendant submits that was sufficient to meet the requirements of clause 2(5) of the Lease. I disagree. Two hot water vessels and two boilers is not what was demised. Clause 2(5) required the Defendant to keep all four boilers in good and substantial repair and condition.

68. More significantly, the two boilers that were still operating cannot, on any view, be described as in good and substantial repair and condition at expiry of the term. On the contrary, the gas safety records from 2014 onwards record comments such as "*boilers in poor condition & in need of replacement*", "*boiler No 3 Thermocouple interrupter overheat stat defective new required but obsolete*" and "*boiler in poor condition for many years. New boilers required ASAP.*"

69. Further, the quotation received from Johnson Controls BE UK Limited on 8 November 2016, shortly after expiry of the Lease recorded both functioning boilers as having serious safety issues. One was leaking gas into the boiler room and had to be put out of service immediately. The other (boiler no. 3) was only operating because a safety device had been disconnected some time ago. The FHPESS report recommended "*immediate replacement of the system*".

70. Mr. Preston's opinion that, despite the matters referred to above, the two boilers were in good and substantial repair and condition at lease expiry I found untenable. I accept Mr. Lane's evidence that the boilers were in an obsolete and unrepairable condition at the time the Lease expired. I therefore have no hesitation in finding that the Defendant was in breach of its obligations under clauses 2(5) and 2(9) of the Lease in relation to the condition of the boilers at lease expiry.

71. The question then is as to the quantum of the repair costs. The sum for which judgment is sought by the Claimant in relation to the boilers is £154,672 taking into account concessions made by Mr. Lane in evidence that the water conditioner (£720) and water softener (£3,460) constituted betterment.

72. The quantum of the Claimant's claim is based on the FHPESS Report, the ensuing scope of work prepared by Mr. Lane and the actual costs incurred by the Defendant following a tender process for the boiler works. The FHPESS Report set-out FHP's survey findings as to the existing installation and their recommendations "*for the remedial work required*". The survey itself was carried out on 5 December 2016. The Defendant argued that the quantum was overinflated and excessive on the basis that the replacement heating system was a modern high-end system beyond what was necessary to replace the failing boilers. Inevitably, the new system was a modern system meeting modern safety and other standards. However, that in itself does not mean that

the system went beyond what was necessary to put the system into the condition it ought to have been in at lease expiry.

73. The Defendant then took issue with several of the Items in the tender claimed for. I deal with each tender item in turn:

(i) Item .01 Contract Particulars, Preliminaries, Design, Surveys and working drawings in the sum of £5,900. This was not objected to by the Defendant.

(ii) Items .02 and .03 Supply design (£2,000 x2). The Defendant submitted that it was not clear whether this service was required or carried out. The scope of work was to supply design data to confirm the capacity of the proposed boiler and domestic hot water installation. FHP had recommended that the number and type of boilers be determined by the contractor as part of their design role. It seems to me that it would be usual for a client to require this type of information for a new heating and hot water system for a hotel. Further, I consider it most likely that if this service was requested and paid for it was because it was both required and undertaken. I have therefore allowed the item.

(iii) Item .04 (£750), for inspection of the boiler flues and confirmation of their suitability for relining to allow installation of condensing boilers, was not challenged by the Defendant.

(iv) Item .05 Temporary boilers (£14,986). Mr. Preston's evidence was that the one remaining boiler could have been used until the new boilers were installed. Mr. Lane's evidence was that the remaining boiler was unsafe and that the gas supply to the boiler would have had to be disconnected in any event. He also explained at paragraph 5.4.4 of his report that the whole of the existing system had to be isolated and taken out of service since the boiler replacement included the need to replace the existing flue. I prefer the evidence of Mr. Lane over that of Mr. Preston for the reasons I have already given. Boiler 3 was only operating because a safety feature had been by-passed and as Mr. Lowry explained it was feared that it might fail at any time. It also stands to reason that if the existing flue had to be replaced the remaining boiler could not continue to operate without it. Further, I do not think it likely that the Claimant would have chosen to incur an additional cost of £15,000 for temporary boilers if they were not needed. I therefore consider that the item was part of the reasonable cost of replacing the boilers.

(v) Item .06 Strip out £2,828. This item of work was obviously required and is recoverable. The strip out of the water heaters is rightly included for the reasons I give below.

(vi) Item .07 Supply and install new boilers: £53,068. This was the cost of supplying four new boilers replacing the four boilers at the time of the demise and is, in my judgement, recoverable. The Defendant argued that this was not a like for like replacement because

this resulted in six functioning vessels on site that is 4 boilers and 2 water heaters. However, what was demised was four boilers and not 2 boilers and 2 water heaters. Further, for the reasons explained below I have come to the conclusion that retaining the two water heaters was not a reasonable option.

(vii) Item .08 Radiator valves: £5,568. Mr. Lees submitted that there was no evidence that the valves needed replacing, that Mr. Preston had identified the replacement valves as an improvement and that Mr. Lane had accepted that the replacement "*probably wasn't something that was strictly necessary*". That however was not the test. The test is whether or not the valves were in good and substantial repair and condition at expiry of the term having regard to the age character and locality of the premises at the grant of the Lease and the use to which the premises were permitted to be put. Mr. Lane explained that the radiator valves throughout the hotel were of a different genre with some having thermostatic radiator valves others not and that a number of the valves were not in good condition and not working. He also explained that whilst a wholesale replacement was not strictly necessary the Claimant "*wanted to do as good a job as possible*". In light of Mr. Lane's evidence I consider that some of the valves did need replacing. However, the fact that the valves were non-consistent in terms of age and model does not in my view equate with being in disrepair and the standard does not extend to doing as good a job as possible. Further, since I cannot ascertain how many valves were not working, I have not made any allowance for this item.

(viii) Item .09 Modification of the flue: £15,908. The Defendant accepted that installing new boilers would require some flue modification but submitted that a discount ought to be made because Mr. Lane had not investigated other options or costs. However, there was no evidence that another option was available or that the item could have been obtained at a lower cost. The tender process is evidence of steps being taken to ascertain the reasonable cost of undertaking the works. I therefore see no basis on which to make the discount sought by the Defendant. The flue needed to be modified in order to install boilers compliant with modern safety and other standards. I have therefore allowed the item.

(ix) Item .10 Boiler Room Ventilation to meet BS 5440 (£3,600). Mr. Lees submitted that this item should be discounted in its entirety on the basis that Mr. Lane had failed to consider whether it was necessary. I do not think that is right. The FHPESS Report expressly referred to the fact that suitable ventilation to the boiler room would need to be fitted to comply with the gas regulations regardless of the various boiler replacement

options. This was therefore part of the reasonable cost of having to replace the boilers and recoverable.

(x) Item .11 New domestic hot water system (£31,440). It was the Defendant's case that there was no need to replace the water heaters. These were reported as being operational at the time of the takeover and it was common ground that they were not in disrepair. However, Mr. Lane's evidence (which I accept) was that in order to comply with the relevant building regulations the boilers had to be replaced with condensing boilers requiring a certain type of condensing type flue whereas the water heaters required non-condensing flue equipment. Retaining the two water heaters would have meant installing a second flue which would have been a major and costly endeavor in a listed building such as the Property. That evidence was supported by the FHPESS report which also referred to the fact that a separate flue would be needed if the hot water heaters remained. There was no evidence to support the Defendant's submission that there were other options available. In short, the water heaters that were installed by the Defendant as a partial replacement for the two defunct boilers were incompatible with the required new boiler flue and it was therefore necessary to install a different system to remedy the Defendant's breach of covenant. The new hot water system was therefore a necessary part of replacing the boilers and the cost recoverable.

(xi) Items .12 Water conditioner (£720) and .13 Water softener (£3,460). Mr. Lane agreed these items constituted betterment and I have therefore excluded them.

(xii) Item .14, Install new thermal insulation on all new and retained pipework and fittings (£2,874). Mr. Lane explained that this was not an improvement on the basis that it was normal procedure in any new boiler installation to insulate the pipework. It seems to me that the need to incur this cost was an inevitable consequence of the Defendant's failure to deliver up the boilers in good and substantial repair and condition and thus recoverable.

(xiii) Item .15 (dynamic flush) (£1,800), Item .16 (dose to hot water system) and Item 17 (test and commission new systems) (£2,800). The testing and commissioning of the new systems was obviously required. The Defendant submitted that both Items .15 and .16 should be discounted on the basis that there was no evidence that they were necessary. However, Mr. Lane prepared the pricing document on the basis of FHPESS's reports and recommendations and in accordance with his role as contract administrator. I do not see a proper basis for concluding that he included Items .15 and .16 without reason.

(xiv) Item .18 (demonstration) (£750), item .19 (drawings and manuals) (£1,200) and item .20 (other items) (£3,800) were not challenged by the Defendant.

(xv) Item .19 Drawings and O&M files (£1,200) was not objected to by the Defendant.

74. The above findings result in a quantum in respect of the need to replace the boilers and, as a result, a large part of the heating and hot water system of £148,704.

External Decoration (Items 5.0 – 5.2) (£56,115)

75. Clause 2(7)A of the Lease required the Defendant to decorate the exterior of the Property in the final year of the term and to do so in a proper and workmanlike manner. It is common ground that the Defendant did not do so in the 12 months leading up to 27 September 2016. I have already dismissed the Defendant's argument that the final year of the term ended on 31 March 2014. The Defendant was therefore in breach of clause 2(7)A of the Lease.

76. In addition, the Defendant submitted that it was not proportionate for the Claimant to spend some £56,115 on external decoration because external decoration works had been undertaken by them in 2014/5. However, the photographs, videos, Audit-Pro Report and Mr. Lane's evidence (based on his several visits and inspections of the Property) all support the conclusion that the works undertaken by the Defendant in 2014/5 were poor, that the external decorations were not in good and substantial repair and condition at the time of lease expiry and that the Property needed to be redecorated.

77. Mr. Lane stated in his report, and I accept that:

> "*The decorations, in particular the joinery items, including doors, windows, cladding and terrace WCs, were incomplete to some areas, whilst poor preparation in the damp and cost weather conditions, the paint type seemingly used and application in a number of coats that were still grinning through all contributed to an unsatisfactory standard of finish which I witnessed when in inspected on 24th July 2015, and 5th, 6th and 13th October 2016. Little attention to the underlying poor and rotting timber substrates were tackled. This was further evidenced on the Defendant's PNC/Verismart check-out report P. 301 taken 1.5 years after the Defendant's limited works were carried out and the fact that very little external detail photographs were included in their report.*"

78. Further, when cross examined on the issue Mr. Lane went on to explain that the works the Defendant had undertaken "*left a lot to be desired*" and that "*the finish around what looked like a single coat of paint meant that the undercoat or previous coats underneath were grinning through so therefore the coverage was not substantial to last any period of time before having to be undertaken again*".

79. Indeed, it appeared during Mr. Preston's oral evidence, and in particular when various photographs of the exterior of the Property were put to him, that he accepted that some external decoration was required. He also said that he had included some £26,875 for external decoration

in his costings although these had been labelled "*notional internal redecoration costs*". Given how low Mr. Preston's costs generally were, his figure of £26,875 suggests that he in fact recognized that significant external decoration works to the Property were required.

80. It was also submitted by the Defendant, on the basis of Mr. Preston's report, that the exterior decoration finishes should only be judged from a distance of 2 meters away regardless of their actual condition. I reject that submission. It suggests that it would be acceptable to cover up defects so that they might not be seen from a distance of 2 meters with (for instance) one coat of poor quality paint. I think that an unacceptable basis on which to determine whether or not it was disproportionate for the Claimant to redecorate the whole of the exterior of the Property.

81. Given both Mr. Lane and Mr. Preston's evidence in cross examination, I have concluded that there was nothing disproportionate in the Claimants undertaking the necessary external redecoration works in the spring / summer of 2017, that is at the first opportunity after having taken over the Hotel. Nor was it disproportionate (let alone "*wholly disproportionate*" as submitted by the Defendant) to repaint the whole of the exterior of the Property given how poorly undertaken the 2014/5 works were, the documentary evidence of the actual condition of the exterior of the Property and the obvious need to avoid a patch work effect. Again, I doubt that the Claimant would have undertaken these works had it not needed to do so, not least given the inevitable disruption to the conduct of its business and the inconvenience to its clientele during the spring and summer months when the work had to be undertaken.

82. Items 5.0, 5.1 and 5.2 relating to the costs incurred by the Claimant in relation to external decoration works total £56,115.

Window Repairs (Item 2.16) (£70,903.10)

83. In his report, Mr. Lane described the situation in relation to the windows in the following terms:

> "*Disrepair was widespread to joinery items including windows, frames, door bays and fascias and, in addition, some glazing panes needed to be replaced where they had been cut to install the Defendant's portable AC units or were cracked. The Claimant's AuditPro file reports detail to the extn window repairs were repaired. Photographs and video documents show the general condition of the windows did not alter and in fact got worse for the fact of the application of the poor preparations and timings of the Defendants redecorations. The Claimant window repairs are presented on Audit profile referenced to a window plan. The window units' accessories such as sash cords, sash spiral springs, restrictors, latches and locks were in many cases missing, broken or defective and in need of replacement …*"

84. Having explained what he had seen during numerous inspections of the Property, in reply to my questioning, Mr. Lane stated that in his opinion there had been no routine maintenance of the windows "*for quite some time*" and "*over a number of years prior to 2016*". Mr. Lane's photographs and the video footage evidenced defects to the windows and exterior doors of the Property. Although the AuditPro report evidenced the works that were undertaken to the exterior of the windows in June/July 2017, that is several months after expiry of the Lease, the report confirms the fact that several of the windows were indeed in poor condition, some in very poor condition, with significant amounts of rotten timber. Indeed, the photographs suggested to me that water might have leaked from air conditioning units installed by the Defendant whose extractor pipes had been placed through certain window panes.

85. Taking the evidence as a whole, it is clear that the condition of the windows at the time of the handover varied. Some were in good condition, some required minor repairs but a large proportion (as much as a quarter or a third) required repairs and in some instances significant repairs. The Defendant was not obliged to address minor issues. However, it was required to address items of disrepair that the reasonable operator of a high class hotel would expect to see addressed before taking a lease of the Property. That disrepair existed at the date of tenancy expiry is in my view certain. Water damage, rotting window frames, rotting doors, rotting sills, missing putties, broken sash cords, seized springs, cracked glass and such issues as are evidenced by the Auditpro report were not matters that appeared in the 6 months following expiry of the Lease. They are all matters that needed to be addressed by the Defendant in order to comply with its repair covenant. In failing to do so the Defendant was in breach of its contractual obligations.

86. The repair works to the windows as a whole were tendered to three contractors by Mr. Lane. The Defendant strongly criticized the fact that there was no detailed survey of each window undertaken prior to the tendering of the work which instead was approached on the basis that some windows would require considerably more work than others. In my view the process adopted by the Claimant and Mr. Lane was reasonable. It would not have been reasonable, nor was it necessary, to undertake a detailed survey of each and every window prior to tendering the work. Such a survey would in itself have added to the cost of dealing with the problem and no doubt required scaffolding to be put up and brought down again involving additional costs and disruption to the Claimant's business. Instead, Mr. Lane tendered the works to three contractors whose prices came in at very similar figures.

87. Mr. Lees sought, on behalf of the Defendant, to categorize the windows by reference to their condition as evidenced by the Auditpro report and to quantify the cost of repair on the basis of an average cost for each window given by Mr. Lane in evidence of £400-£450. Despite Mr Lees' valiant efforts, I consider that exercise misguided. One cannot allocate a repair cost of £400-450

to a window in good condition and the same sum to a window in very poor condition. The total sum incurred by the Claimant in repairing the windows was incurred on the basis that some windows required significant repairs and others not.

88. Donland Engineering, whose tender was accepted, priced the works, based on Mr. Lane's specification, as follows:

> *6 External*
> *7 Carefully review all timber windows on site to those details on given accompanying plans. Allow to reference each window to the plan and schedule out the required works to each unit to overhaul and to put back into a fully servable condition. Include all windows where recent glazing replacement has occurred due to AC unit removal where it is of mis-matching type. Schedule to be given to CA. £4,980*
>
> *8 Allow to take out and replace/splice in all new timber to replace missing/defective timber Elements incl. beading, weight boards, sills, frames, units, putties, sash cords, pulleys, weights, brassware, stops, winders, mis- matched/cracked or defective glazed panes and masticwork as directed in item above. £52,820*

89. Mr. Lees submitted that these fixed costs were not recoverable because they were calculated without reference to the actual state of the building. That I do not accept. Whilst there was no detailed survey of each and every window, the contractors must have assessed the likely scope of the repair works required before pricing it. Further, the fact that all three tenderers came up with very similar figures confirms that they had a good grasp of the likely scope of work involved in repairing the windows. There was nothing wrong in my view with the Claimant obtaining a fixed price to undertake the works.

90. It is correct that, as can be seen from the Auditpro report, some of the remedial works involved minor repairs in relation to items of wear and tear which alone would not have given rise to a breach of the Defendant's covenant to repair. Given that the works as a whole were undertaken by reference to a fixed price it is not possible to identify what element of the cost related to minor repairs. However, the works that were priced by Donland Engineering were not minor works. The review of all the windows, need to put them into serviceable condition and the repairs described in Item 8 of Donland's tender were all works that needed to be undertaken to put the windows into good and substantial repair and condition. This was the actual cost of the remedial works incurred by the Claimant. Accordingly, I have come to the conclusion that the sum claimed of £57,800 in respect of the window repair works was reasonable and recoverable by the Claimant.

91. In addition to the fixed costs quoted for by Donland Engineering there were then variations as recorded in Donland Engineering's final account as follows:

    (i) Item 10, Rotunda Window Repairs in the sum of £8,280;

    (ii) Item 20, Juliet Balconies in the sum of £2,691; and

    (iii) Item 22, Front elevation window repairs in the sum of £2,192.

92. The Defendant submits that none of these costs should be recoverable on the basis that there is no evidence as to why these works were not included in the original tender or as to the nature of the disrepair and/or when it arose. I do not think anything turns on the fact that these items were not included in the original scope of work. The question is whether these works were required to put the items in question, that is the rotunda windows, Juliet balconies and front elevation windows into good and substantial repair and condition i.e., in the condition they ought to have been in as at termination of the Lease. Mr. Lane's evidence was that all the works to the joinery claimed for were required given the widespread disrepair of the joinery items and "*many years of neglect*" and that these were costs incurred to repair those items. I accept Mr. Lane's evidence in this respect and therefore consider the cost incurred in respect of these further items recoverable from the Defendant as part of the cost of returning the joinery items to the condition they ought to have been in as at termination of the Lease.

93. This brings the total recoverable by way of damages in relation to the Window Repairs to £70,963.

Scaffolding (Item 6.2) (£37,580)

94. The Claimant incurred £37,580 in scaffolding costs to undertake the exterior decoration and window works.

95. Mr. Lane gave a detailed explanation as to why the scaffolding was needed by reference to the building, the scope of works, the numerous trades involved and the need to undertake the works in a safe fashion. It was the quickest and he thought most cost efficient way of undertaking the works. Repairs to certain of the windows could not have been undertaken without. Mr. Preston disagreed. In his view the works could be undertaken using a scaffolding tower, ladders and cherry pickers. As already noted, Mr. Preston similarly insisted that scaffolding was not needed to undertake works to the rotunda even though it hung over the river so that clearly neither tower nor cherry picker could be used.

96. I have no hesitation in preferring the evidence of Mr. Lane on this issue. It seems to me evident given the nature of the building and of the exterior works required that scaffolding would need to be used both to ensure proper access and safety. Further, the cost incurred of £37,580 was a

cost that was tendered to three contractors and in line with what the other two contractors proposed confirming the sum incurred as reasonable. I therefore find the sum of £37,580 recoverable.

Contractor Preliminaries (£86,906)

97. This category of cost comprised £35,000 in relation to MJ Mapp Limited's (i.e., Mr. Lane's) contract administration fees and £51,906 for contractor preliminaries. Both Mr. Lane and Mr. Preston considered that contractor preliminaries would usually be in the region of 7-15% of the cost of the works, although Mr. Preston's view was that this should include scaffolding. The preliminaries were therefore high and beyond the industry standard. However, the base preliminaries incurred in instructing Donland Engineering to undertake the Works were less than those proposed by the other two tenderers – that is £43,442 as opposed to £48,328 quoted by Arc Group and £56,000 quoted by Alan Durkan. There is also a very detailed breakdown of the items that went into Donland Engineering's preliminaries. Further, I agree with Mr. Webb that the best indication of the reasonableness of the cost of the preliminaries is the competitive tender process undertaken in relation to these specific works rather than a broad brush industry standard. I also accept Mr. Lane's explanation that the reason the contractor preliminaries were so high was because of the complexity of undertaking the works to a listed building whilst it continued to operate as a working hotel.

98. The items going to make up the balance of the sum of £51,906 comprised items 2, 3 and 20 of Donland Engineering's final account and item 14 of the Variations relating to the supply of two skips for the purposes of the variations (£1,144). Items 2 and 3 related to the boarding up of openings created by the temporary removal of windows and doors (£5,740) and the requirement for the contractor to follow house rules and security/fire safety procedures (£1,280). Item 20 related to a requirement to take photographs and reference these to the items of work undertaken (£300). These sums total £7,320. The other two tenderers quoted sums of £5,900 (Alan Durkan) and £8,000 (Arc Group) for these items indicating that the sums charged by Donland Engineering were within a reasonable range. The additional skips were clearly part of the variation works.

99. However, I agree with the Defendant that there appears to have been duplication in relation to the scaffolding alarm that appears both in the scaffolding costs and the preliminaries at £820. I have therefore made a deduction for this sum from the contractor preliminaries reducing these from £51,906 to £51,086.

100. The contract administration fees of £35,000 or a fee of 7.45% of the cost of the works is the fee that was agreed by the Claimant with MJ Mapp. As experienced hotel operators I doubt that the Claimant would have agreed a fee that was not reasonable. Further, Mr. Preston's evidence to the effect that the fees should have been limited to £7,000 was based on his admitted costs and

not on the actual cost of the works. His evidence that there should be no difference in the contract administrators fee regardless of the scope and amount of the costs of the works was not credible.

101. I have therefore concluded that the Claimant is entitled to recover for the contractor preliminaries and contract administration fees it incurred in the sum of £86,086.

102. Therefore, the total for Incurred Costs, including the agreed sums (£29,406) is £428,850.

Costs not Incurred

103. Two preliminary matters arise:

(i) *Firstly*, Mr. Lees submitted that there was no loss in relation to the non-incurred costs because they had not been incurred. However, that is not relevant where (as already noted) the proper measure of damages in a dilapidations case is the reasonable cost of the works required to put the property in the condition it ought to have been in when delivered up, whether those works were undertaken by the landlord or not, subject to the statutory cap.

(ii) *Secondly*, Mr. Lees submitted that the non-incurred costs were wholly disproportionate to the benefit which would have been conferred on the Claimant because, according to the Defendant, on any sale of the Property the buyer would undertake a full refurbishment of the Property and not be concerned with issues such as the condition of the carpets. Whether a buyer would inevitably undertake a full refurbishment of the Property was a disputed issue. However, regardless, the measure of damages falls to be assessed by reference to the date when the Lease expired which has nothing to do with a sale that was not contemplated at the time and did not take place until some 3 ½ years later. The Ruxley principle, based on the intention of a hypothetical purchaser, does not therefore arise.

104. There are 4 claim items: carpets, replacement furniture, internal decoration, and preliminaries / management fees.

Carpets (Items 1, 1.2 and 1.3) (£75,233)

105. This claim was put on the basis of clause 2(6) of the Lease, namely that the carpets had become worn out or unfit for use and therefore required to be replaced.

106. It is clear from the video evidence, photographs and Verismart report that the carpets in several areas of the hotel were worn, discoloured, rucked, separating at the seams, stained, and draft marked. Mr. Lane confirmed when questioned by me that the photographs were examples of the general condition of the carpets and not merely the worst instances of damage. The bedroom carpets were the original carpets installed during the 1992/3 renovations of the Property. It is therefore not surprising that they should have been in poor condition after 20 years of use in a hotel setting. Remarkably, in my view, Mr. Preston's opinion was that black draft marks on the

carpets in the bedrooms added character to the building rather than old dirty carpets not fit for use in a high class hotel. Mr. Hardwick also gave evidence that having visited the Property he had formed the view that the carpets in the majority of the areas of the hotel were worn and tired.

107. Mr. Preston (together with the Defendant) also argued that since the Claimant had not replaced the carpets in the three and a half years before selling the hotel these were fit for use in a high class hotel. I do not think the fact that the Claimant cleaned but continued to use the carpets means that they were fit for use in a 4 star hotel. There are numerous reasons why the Claimant may have continued to use the carpets despite their poor condition. Mr. Lowry's evidence was that the Claimant knew that the hotel required significant redecoration and re-carpeting works to the interior but that the external and boiler works had been disruptive to the running of the Hotel and that the Claimant wanted to try to make a profit before undertaking more works. However, it became apparent that that could not be achieved without carrying out repair and redecoration works to the interior of the Property whereupon the Claimant started to look at selling the Property.

108. I accept the evidence of Mr. Lane, Mr. Hardwick and Mr. Lowry as to the condition of the carpets and I agree with the Claimant that carpets in the condition evidenced by the Verismart report, photographs and videos were worn out in places and generally not fit for use in a High Class hotel. It follows that they ought to have been replaced by the Defendant pursuant to clause 2(6) of the Lease. To the extent that not all the carpet needed to be replaced (undamaged aged carpet, for instance, did not require replacement) that is reflected in the quantum figures addressed below.

109. The Defendant submitted that the cost of replacing the carpets would have been out of all proportion to the benefit to be obtained so as to rely on Ruxley. That cannot be right. There was clearly a significant benefit to having carpets in good condition and fit for use in the high class hotel since that would enhance the Hotel's image and offering. As Mr Lowry explained it was the poor condition of the carpets and internal decoration that hampered increasing the room rate.

110. As regards quantum, the Claimant has limited its claim to the cost of a generic commercial carpet rather than the original Axminster 80/20 in place at the time the Lease was granted and to the cost of replacing the carpets in the bedrooms and the worst parts of the communal areas. The cost calculations were set out in the schedule to Mr. Hardwick's report based on Mr. Lane's calculations. The surface areas were the result of input from a quantity surveyor. The calculations show a significant reduction in the rate as well as a significantly reduced area in relation to the lower ground floor carpeting as compared to what appeared in the original Scott Schedule. Mr. Lane explained that this was because when he and Mr. Hardwick re-assessed the areas they took into account possible areas of carpet that could be retained. They differentiated

between the bedroom carpets which Mr. Lane considered all needed to be replaced and the common areas. The rate was revised as a result of Mr Hardwick's evidence that a purchaser would not be concerned with whether the carpets were Axminster 80/20 or a generic commercial carpet.

111. Mr. Lane was criticised by the Defendant for not going back to ascertain precisely what carpets needed to be replaced at the time Mr Hardwick was preparing his report. However, Mr. Lane could not do so since by that time the Hotel had been sold. He had to rely on his numerous previous visits to the Hotel. Mr. Lees also heavily criticized Mr. Lane for reducing the surface area to be recarpeted of the lower ground floor from 340m^2 to 30m^2 (a reduction of 310m^2) but not reducing any of the other communal areas in the schedule. Leaving aside the separate Pavilion, the total communal carpeted surface area came to 659m^2. Notably the carpet on the lower ground floor was carpet that Mr. Preston had identified in his report as needing replacement on account of flooding (albeit that he allocated responsibility for that to the Claimant).

112. Reading between the lines what appears to have happened is that Mr. Lane reduced the total surface area of the common parts to be recarpeted by 310m^2 but only allocated the reduction to the lower ground floor. That would explain Mr. Lane's evidence to the effect that adjustments had been made to the bottom line in the Schedule and then reflected in the subtotal figures. In other words, according to the calculations annexed to Mr. Hardwick's report the total surface area to be recarpeted for the common parts (Item 1.4) was significantly reduced to take into account the fact that not all the carpets in the common areas needed to be replaced.

113. Taking the evidence as a whole, I have come to the conclusion that the bedroom carpets were in poor condition and did need replacing and that a substantial reduction to the surface area to be recarpeted of the common parts made by the Claimant properly reflects the fact that whilst a significant amount of carpet was in poor condition, not all the carpets in those areas needed replacing. I therefore accept the Claimant's revised estimated cost calculations as set out in the Appendix to Mr. Hardwick's report resulting in a quantum for this Item of £75,233.

Replacement furniture (Item 1.15) (£88,376)

114. Here too the Claimant relied on clause 2(6) of the Lease submitting that a proportion of the furniture was not fit for use in a high class hotel. At paragraph 5.7.2 of his report Mr. Lane explained that:

> "*The bedroom furniture items including bedroom and dressing tables, chairs although largely original had been poorly maintained with chipped and scratched laminate finishes, poorly applied lacquer and stained furniture with drips and tarnished and scratched metal knobs and pull handles*".

115. Photographs of certain items of furniture show items in poor condition. There are photographs of peeling veneers, dripping lacquer, scratched furniture, discoloration and generally worn and otherwise damaged items of furniture. I agree with the Claimant that furniture in that condition was not fit for use in a four star (or high class) hotel. That the furniture had not been well maintained was further supported by the absence of any allowance in the Defendant's accounts for FFE from 2014 onwards.

116. At Item 1.15 of the Scott Schedule Mr. Lane set out his estimate of the costs of replacing the furniture, fixtures and equipment in the bedrooms. The costs were for:

> "*Replace worn or damaged or missing FF&E within bedrooms including curtain shears (no proof of fire resistance) desk chair, armchairs, lights shades new artwork due to fading, wooden furniture to be French polished. Brasswear scratched, tarnished or UVC* "

117. The specific items include allowances for curtain sheers (I have assumed that "shears" is a typographical error), the overhaul of the furniture, re-upholstering tub chairs, desk chairs, artwork, light fittings and electrician costs totaling £88,376.

118. In evidence, Mr. Lane estimated that 30 to 35% of the bedroom furniture was not fit for use in a high class hotel. In light of Mr. Lane's evidence, the Claimant has reduced its claim in respect of replacement furniture from £88,376 to £30,931.60 being 35% of the £88,376 figure. The Defendant sought again to rely on the Ruxley principle but once more it is difficult to see how the cost of replacing furniture that was not fit for use in a high class hotel could be said to be totally disproportionate to the benefit of having furniture in good condition.

119. I accept Mr. Lane's evidence as to the condition of the bedroom furniture and proportion of items that were not fit for use. However, the costings include items such as the curtain sheers which were not specifically addressed or explained. I have therefore made a deduction for the sum of £27,000 in respect of curtain sheers. Further erring on the side of caution, I consider that not more than 30% of the cost of the balance of the items (furniture and light fittings) is reasonable making the reasonable cost figure £18,413.

Internal decorations (Items 5.3 to 5.5) (£52,357)

120. Clause 2(7)B of the Lease required the interior of the Property to be decorated in the last year of the term. It is common ground that the Defendant did not carry out any internal decorations in the year prior to 27 September 2016. The Defendant was therefore in breach of the obligation.

121. Further, Mr. Lane's evidence was that "*where maintenance and subsequent redecoration had been done it had been done ad hoc, in the wrong type of paint, in the wrong color and therefore decorations … needed to be carried out*". Examples of the issues could be seen in Mr. Lane's

photographs and the Verismart report. Mr. Preston disagreed largely saying that paint work could be cleaned and dismissing the difficulty with the patch work effect of different paints having been used at different times in the past. Taking into account the documentary evidence, I prefer Mr. Lane's evidence. Regardless, the fact remains that the obligation was breached – the Claimant was entitled to have the hotel returned to it with the internal decoration undertaken in the 12 months leading up to Lease expiry.

122. Once more Mr. Lees sought to rely on the Ruxley principle submitting that the cost of internal decoration was disproportionate to the benefit to be gained. I do not accept that submission. To my mind it is obvious that the Hotel would have benefitted from internal redecoration. Indeed, it was Mr. Lowry's evidence that the poor condition of the Property restricted the room rate and that it became obvious, having tried, that they would not be able to drive up the interest in the restaurant and hotel as an event venue without carrying out the interior repair and decoration works.

123. The Claimant's figures for internal redecoration were calculated by a quantity surveyor based on rates from the BCIS and 2016 prices. These sums totaled £146,917. However, the sums claimed are less than those calculations because Mr. Hardwick's view was that not all internal redecoration would impact on value. Deductions were therefore made by Mr. Lane which appear in calculations set out in Appendix PH3 of Mr. Hardwick's report reducing the sum claimed to £52,357. Mr. Lees heavily criticized these calculations pointing out (rightly) that which items were included, and which were not, did not always make sense. So, for instance, the painting of the internal door frames was retained but not the painting of the doors themselves. Mr. Lane explained that the calculations were the result of his discussions with Mr. Hardwick and that the primary focus was the bottom line. Overall, when one looks closely at the calculations one can see that there was a logic to the majority of the figures. For instance, repainting of all the walls was included (save in the bathrooms) and 25% of the ceiling areas. On balance, I agree with Mr. Webb that this was not an exact science not least because it involved second guessing what parts of the decorations would impact valuation. In essence, what is being said by the Claimant is that a little over 1/3 of the internal decoration required would impact value. Having carefully looked at the figures, I have come to the conclusion that the sum of £52,357 based on Mr. Lane's calculations following his discussions with Mr. Hardwick, and representing a third of the cost required to redecorate the Hotel internally, is reasonable and therefore recoverable.

Contractor Preliminaries and Management Fees (£51,590)

124. This is a claim for contactor preliminaries and management fees in respect of Items 1, 1.2, 1.3, 5.3 and 5.5. The Preliminaries comprises £32,890 being 15% of the costs claimed in the Scott

Schedule. The Management Fees total £18,700 equating to 7.45% of the costs claimed in the Scott Schedule.

125. The 15% for preliminaries is at the top end of the industry expected range. At paragraph 6.1.1 of his report Mr. Lane referred to the preliminaries as 9.1% of the repair costs as being included not the 15% seen in the Schedule. Taking 10% as a reasonable percentage for preliminaries, which is well within the industry expected range, gives rise to an estimated cost for Contractor Preliminaries of £12,759. To that falls to be added a percentage for Management Fees which based on the fees agreed for the incurred works is 7.45% (which I consider reasonable for the reasons already given) giving rise to a figure of £9,505. That gives a total figure for Contractor Preliminaries and Management Fees of £22,264.

126. The Defendant's point that no loss was suffered in relation to these costs is not relevant, the measure of damages being the reasonable cost of the works required to put the property in the condition it ought to have been in when delivered up, whether those works were undertaken by the landlord or not. Contractor preliminary and management costs are part of the reasonable costs of the works.

127. This gives a total in respect of the non-incurred costs aspects of the claim of £168,267.

The statutory cap

128. The cost figures set out above relating to the Defendant's breach of the covenant to repair, that is clause 2(5) of the Lease are however subject to the statutory cap. Those costs are:

(i) Boilers (£148,7041);

(ii) Window repairs (£70,963);

(iii) Most of the Incurred cost items that were agreed (£29,406) save for the kitchen gas interlock and fan replacement (Item 3) which falls under clause 2(6) of the Lease (£9,886); and

(iv) A proportion of the scaffolding, contractor's preliminaries and management fee costs.

129. By section 18(1) of the 1927 Act damages for breach of a covenant to repair "*shall in no case exceed the amount (if any) by which the value of the reversion (whether immediate or not) in the premises is diminished owing to the breach of such covenant or agreement*".

130. The external decoration works together with a proportion of the scaffolding, contractor's preliminaries and management fee costs and the cost of replacing the kitchen gas interlock and

fan arising out of breaches of clauses 2(7)A and 2(6) of the Lease are both incurred costs and not subject to the statutory cap.

131. To the extent that relevant works were not carried out i.e. in relation to the Cost Not Incurred items (totaling £168,267) any loss is limited to the diminution in value of the reversion arising out of the Defendant's breaches.

132. There was a large measure of agreement between Mr. Hardwick and Mr. Chess. Notably, they agreed that:

(i) In reaching their opinions it was necessary to consider the likely type of hypothetical purchaser for the Property at the valuation date and how their purchase price "bid" might be affected by the condition of the Property;

(ii) The likely hypothetical purchaser would be an owner intending to operate the Hotel;

(iii) A purchaser would most likely adopt a profits valuation using a Discounted Cash Flow approach. This in turn involves the preparation of an income and expenditure forecast to project future profits. Those forecasts would represent what a likely hypothetical purchaser would consider as a reasonable estimate of future income. It is therefore an approach that requires subjective assessment on the part of the valuer based on the available evidence and his experience; and

(iv) Part of the valuation process is to make an allowance, or deduction, from the valuation for works which are required as a result of any breach of the terms of the Lease and which in the opinion of the valuer impact the price that would be paid for the property on a sale.

133. Mr. Hardwick and Mr. Chess also agreed that certain elements of the remedial works would impact the value of the reversion in the amount of the reasonable costs required to remedy those issues. Those cost elements were the costs for the boilers, window repairs, external decorations, scaffolding and contactor's preliminaries and administration.

134. The issue between the valuers was therefore limited to (i) whether the general repairs; and (ii) the Non-Incurred Cost Items (i.e. the carpets, furniture and internal decoration) would have an effect on value.

135. A key difference between Mr. Hardwick and Mr. Chess lay in their different opinions as to the intention of the hypothetical purchaser and more particularly as to the extent of the refurbishment the hypothetical purchaser would undertake. Mr. Chess's view was that a buyer would undertake a full refurbishment of the Hotel and therefore replace all the carpets and furniture (for instance) so that the condition of such items would not impact on the value of the reversion. Mr. Chess' evidence was that it was generally accepted that a hotel would be given a full refurbishment every

7 to 10 years (or "hard refurbishment") which might include renewing all the bathrooms and comprehensive redecoration. In his view the Hotel was due a hard refurbishment as at 27 September 2016, not having been refurbished in that manner for 20 years, and would be sold to a buyer wishing to undertake a hard refurbishment and reposition the Property.

136. Mr. Hardwick, on the other hand, considered that a hypothetical buyer would undertake some refurbishment works (e.g. replacing all the ensuites) but not necessarily a full refurbishment. In his opinion had the Hotel been presented in good and substantial repair and condition at the valuation date a purchaser would have expected to be able to operate the Hotel immediately upon acquisition. Thus, if parts of the carpets were in poor condition Mr. Hardwick would expect the hypothetical purchaser to replace what needed replacing whilst retaining what was in good order. Accordingly, the cost of replacement carpets, furniture, interior redecoration and general items of repair are all costs that, in Mr. Hardwick's opinion, the hypothetical purchaser would reflect in his "bid". The Claimant did not pursue the cost of remedying items that Mr. Hardwick did not consider would impact on the purchase price. Thus, it is only, for instance, the cost of replacing the carpets in areas where replacement was most needed that has been pursued by the Claimant.

137. A direct comparison of the experts' respective valuations is not possible because of the different approaches, figures and assumptions used.

138. Mr. Hardwick prepared two valuations, a valuation of the Property out of repair and one in repair considering in each case what effect the condition of the Property would have on the hypothetical purchaser. In essence, he made three assumptions. The first that the hypothetical purchaser would spend £290,000 renovating the bathrooms. The second that the Hotel would otherwise continue to trade in its current format. The third that an allowance of £650,000 was required in Year 1 of his income and profit forecast for remedial works when preparing his out of repair valuation. Mr Hardwick's figure of £650,000 for repairs is not far off the figure I have found reasonable. On that basis Mr. Hardwick valued the Property as at 27 September 2016 in repair at £7,210,000 and out of repair at £5,908,000.

139. Mr. Chess provided 3 valuations:

(i) A valuation of the Property "*in actual condition*" which assumed that the Property was in Lease compliant condition save for the need to make an allowance to replace the boilers and on the basis that the Hotel was traded with no further refurbishment (£6.1 million);

(ii) A valuation of the Property "*in actual condition*" assuming that the Property was not Lease compliant and that £100,000 was required to remedy certain issues and on the basis that the Hotel was traded with no further refurbishment (£6 million); and

(iii) A valuation of the Property in its actual condition but on the basis that the hypothetical purchaser would undertake a hard refurbishment and repositioning of the Hotel entailing a £1 million investment. I will refer to this as the "CAPEX Valuation", and this hypothetical purchaser as the "CAPEX Purchaser". The CAPEX Valuation totaled £7.1 million. In other words, the hypothetical purchaser spending £1 million on the Property could afford to buy it for £6-6.1 million.

140. Several issues arise in relation these valuations:

(i) *Firstly*, Mr. Chess's in repair valuation does not actually value the Property on the basis that the covenants had been complied with but by reference to what he refers to as the "*actual condition*" of the Property. This means, for instance, that his in repair valuation includes a sum for the repair of the boilers of £26,534 which does not reflect the true cost of the item (some £149,000) for the reasons I have already stated. The valuation is therefore not a valuation assuming the Defendant had complied with its Lease obligations.

(ii) *Secondly*, Mr. Chess' out of repair valuation is a further valuation of the Property "*in actual condition*" but assuming that a further £100,000 was required to address various items of disrepair. Once more this is based on Mr. Preston's evidence of condition and costings for works which bear no relationship to my findings in relation to the condition of the Property or to the actual cost of the works that were undertaken or indeed a reasonable estimate of the costs that were not incurred.

(iii) *Thirdly*, whilst Mr. Chess' CAPEX Valuation makes some allowance for items of disrepair that Mr. Chess considered would impact the value of the reversion such as the replacement of the boilers, exterior works and window repair works the figures used were once more based on Mr. Preston's evidence and therefore bore no relationship to the true cost of addressing those items.

141. These issues alone make it virtually impossible to rely on Mr Chess' valuation figures.

142. The established approach to assessing diminution in value for the purposes of section 18(1) of the 1927 Act is to carry out two valuations, the first assuming that the Premises were in the state they should have been in had the tenant complied with its repairing obligations and the second on the basis that the premises were in their actual state and condition. The difference between these two valuations represents the damage to the reversion caused by the disrepair.

143. I agree with Mr. Webb's submission that that is not the exercise that Mr. Chess has undertaken. What Mr. Chess has done is to value the Property in what he describes as its "*actual condition*" making certain allowances for disrepair based on Mr. Preston's figures and assuming that the Hotel would continue to trade with no refurbishment and to then ask whether the CAPEX

Purchaser could afford to purchase the Hotel at those values. He has not provided a valuation of what the CAPEX Purchaser would actually pay for the Property whether in lease compliant condition or not. Further, I do not think that this is the correct approach not least because of the uncertainty as to the extent of the investment in refurbishment that the hypothetical purchaser might wish to make and what he might choose to spend it on. Those matters would then impact the extent to which the existing condition of the Property mattered to the hypothetical purchaser and which aspects of works required to make the Property Lease compliant might be superseded by the proposed refurbishment and which not.

144. As regards the issue of the intention of the hypothetical buyer, it seems to me that either type of hypothetical purchaser might have sought to acquire the Property. In other words, it would be wrong given the evidence of Mr. Hardwick to assume that no hypothetical purchaser would look to continue to operate the Property subject only to a refurbishment of the bathrooms. Nor is there any clarity as to which of those buyers would be prepared to pay the most for the Property. Mr. Chess' evidence was that CAPEX Purchaser would be willing to pay £6.1 million (albeit based on Mr. Preston's costings as to remedial works), but there was no evidence as to how much more he might be willing to pay. Further, given my findings on the costs of the material remedial works, the CAPEX Purchaser would presumably have sought to pay the £6.1 million less the actual repair costs i.e. less some £429,000.

145. In my judgment the exercise that Mr. Hardwick has undertaken is therefore to be preferred since it seeks to establish the value of the Property in and out of repair as a trading asset albeit with a refurbishment of the bathrooms. The difference between his two valuations is £1,302,000, a sum that is greater than the repair and remedial costs claimed by the Claimant to put the Property into the condition it ought to have been in, assuming the Defendant had complied with the terms of the Lease. The statutory cap therefore does not bite.

Other costs

146. In addition to the costs of the remedial works, the Claimant claims the cost of preparing the Scott Schedule (£5,000) and the consultancy fees of Todd & Ledson LLP for the production of quantified costings (£2,000). Given my above findings, the Claimant is entitled to recover those sums noting that there was no issue between the Parties as to their quantum.

Conclusions on quantum

147. Accordingly, the Claimant is entitled to the following by way of loss and damage for the Claimant's breaches of covenant:

(i) Incurred costs in the sum of £428,850;

(ii) Non-incurred costs in the sum of £168,267; and

(iii) Scott Schedule and Quantity Surveyor costs in the sum of £7,000.

These figures give a total of £597,117.

Conclusion

148. Having found for the Claimant on liability, I find that the Claimant's loss properly falls to be assessed at £597,117.

149. I will deal with any further matters consequential on the above, including interest and costs, at a further hearing to be listed once the Parties have had an opportunity to identify the further matters that need to be addressed. I would however record now that I am grateful to both Counsel and their instructing solicitors for the very able and professional way in which they presented their respective cases to the Court.